IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, *ex rel.* JAMES F. ALDERSON, Plaintiffs,	)	
v.	)	Case No. 99-413-CIV-T-23B
QUORUM HEALTH GROUP, INC., *et al.,* Defendants.	)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' FALSE CLAIMS ACT AND FRAUD CLAIMS (STATUTE OF LIMITATIONS AND GOVERNMENT KNOWLEDGE)

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The motion to dismiss filed by Quorum Health Group *et al.* (collectively referred to as "Quorum"), based on the statutes of limitation and government knowledge defenses, combines an artificial construct — that this litigation commenced in either 1998 or 1999 — with fundamental misunderstandings of the Federal Rules of Civil Procedure and the False Claims Act. It should be denied in all respects.

1. Under the False Claims Act and the Federal Rules of Civil Procedure, the Appropriate Date to Use in this Litigation for Purposes of Tolling Statutes of Limitation Is January 5, 1993, When Relator Filed His Initial Complaint.

Relator, James Alderson ("Alderson"), filed this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, on January 5, 1993. For present purposes there were two main consequences to that initial filing: First, the United States, as it is obliged to do, *see* 31 U.S.C. § 3730(a), investigated the fraud alleged by Alderson. Second, by filing his complaint Alderson caused the statute of

limitations to be tolled, such that plaintiffs in this action will, after proving their allegations, be entitled to recover under the FCA and the United States' common law theories of recovery for the entire period alleged in the initial complaint, January 1, 1985 to the present.

a. Relator's Initial Complaint, Filed January 5, 1993, Tolled the Statute of Limitations.

The False Claims Act allows private parties to "bring a civil action for a violation of [the FCA] for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). On January 5, 1993, relator in this case filed his initial complaint with the court. Under Federal Rule of Civil Procedure ("FRCP" or "Rule") 3, "[a] civil action is commenced by filing a complaint with the court." It is this filing, commencing litigation, that tolls the relevant statute of limitations. "In a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations." *Henderson v. United States,* 517 U.S. 654, 657 n.2 (1996); *See also id.* at 657 ("Henderson brought his action well within [the provided for] time period. He commenced suit, as Federal Rule of Civil Procedure 3 instructs, simply 'by filing a complaint with the court.'"); *Arabian v. Bowen*, 966 F.2d 1441, 1992 WL 154026 (4th Cir. 1992) (table) (rejecting argument that action filed but not served within limitations period was time-barred); 4 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 2d § 1056.

The FCA talks of relators "bring[ing]" actions while Rule 3 talks of "commenc[ing]" actions. Nonetheless, it is well-settled that the terms "commence"

and "bring" are synonymous. *Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883); *Byrd v. Bates*, 243 F.2d 670, 673 (5th Cir. 1957); *Gibbs v. Ryan*, 160 F.3d 160, 162 (3d Cir. 1998); *Blumenthal v. G-K-G Inc.*, 737 F. Supp. 493, 494 (N.D. Ill. 1990) ("[I]t is commonly understood that a party 'brings' an action when he files the complaint") (citations omitted). Alderson brought this FCA action, 31 U.S.C. § 3730(b), on behalf of himself *and the United States*, at the time he commenced the action by filing his complaint. Thus, this FCA action was commenced, and the statute of limitations tolled, for both Alderson and the United States, on January 5, 1993.

b. Plaintiffs' Subsequent Complaints All Relate Back to Relator's Initial Complaint.

Under FRCP 15(c) and established caselaw, subsequent complaints filed by relator, and by the United States as intervenor, all relate back to the date when relator filed his initial complaint, January 5, 1993. *E.g., Nelson v. County of Allegheny*, 60 F.3d 1010, 1014-15 (3d Cir. 1995); *United States ex rel. Bayarsky v. Brooks*, 210 F.2d 257, 259 n.1 (3d Cir. 1954); *Staren v. American Nat'l Bank and Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). First, we address the relator's amended complaints. Rule 15(c) provides that

> [a]n amendment of a pleading relates back to the date of the original pleading when ... (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading[.]

Relator amended his complaint three times, by leave of court. Quorum has made no claim that the gravamen of the fraud alleged in these complaints changed;

hence, they relate back to the original pleading.

As demonstrated above, the statute of limitations was tolled for the United States when Alderson brought this action on behalf of the United States. The government's intervention did not interrupt the tolling already in effect, and Quorum cites to no authority for such a counterintuitive proposition. Nor could the government's filing of its complaint somehow stop the tolling that began on January 5, 1993.

FCA actions are unique. They are brought by relators in the name of the United States, which is a real party in interest, so to a large extent viewing the United States to be a new party-plaintiff when it intervenes is misleading — it has always been a real party in interest in the action. *United States ex rel. Kreindler & Kreindler v. United Technologies*, 985 F.2d 1148, 1154 (2d Cir. 1993). No court has *ever* held that the United States' complaint does not relate back to a relator's initial complaint. *See United States ex rel. Mueller v. Eckerd Corp.*, No. 95-2030-Civ-T-17C, at 8 (M.D. Fla. Oct. 2, 1998) (Kovachevich, J.) ("The Government's complaint ... 'relates back' to the date of the relator's complaint pursuant to Rule 15(c), Fed.R.Civ.P. *United States ex rel. Bayarsky v. Brooks*, 210 F.2d 257, 259 [n.1] (3d Cir. 1954).") (Attachment A); *United States v. Reagan*, No. CIV 97-169-TUC-WDB (D. Ariz. Apr. 19, 1999) (Attachment B)*; United States ex rel. Sanders v. East Ala. Healthcare Auth.*, 953 F. Supp. 1404 (M.D. Ala. 1996)*; United States ex rel. Kusner v. Osteopathic Medical Center of Philadelphia*, 1996 WL 287259 (E.D. Pa. May 30,

1996); *United States ex rel. Rahman v Oncology Assoc., P.C.*, No. H-95-2241 (D. Md. Apr. 15, 1999) (Attachment C); *United States ex rel. Costa v. Baker & Taylor, Inc.*, 1998 WL 230979 (N.D. Cal. Mar. 20, 1998).

Rule 15(c) expressly provides that in the average case amended complaints altering parties-defendant relate back. While Rule 15(c) does not specifically discuss the amendment of parties-plaintiff, most courts have interpreted the rule to apply when parties-plaintiff are altered nonetheless. *See, e.g.*, *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014-15 (3d Cir. 1995). The Advisory Committee notes to the 1966 Amendments to Rule 15(c) state that "the attitude taken in revised Rule 15(c) applies by analogy to amendments changing plaintiffs," an issue the Committee viewed to be "generally easier" than situations where parties-defendant are changed. Courts that have not applied Rule 15(c) wholesale to situations where parties-plaintiff are altered have applied it by analogy, nonetheless, including specifically to cases where the United States intervenes in a FCA *qui tam* action. *E.g., United States v. Reagan*, No. CIV 97-169-TUC-WDB (D. Ariz. Apr. 19, 1999) (FCA claim by United States relates back to relator's initial complaint, since allegations were factually and legally similar), *citing In re Syntex Corp. Securities Litigation,* 95 F.3d 922, 934 (9th Cir. 1996).[1/] FCA *qui tam* actions are brought by

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[1/]Quorum also cannot claim surprise at the substance of the charges in the United States' complaint. When the United States filed its complaint, on February 2, 1999, Quorum had been well apprised of the allegations against it. Not only had Quorum had relator's second amended complaint for over five months and his third amended complaint for four months, it also had received, and responded to, several Inspector General subpoenas issued to it under the Inspector General Act, 5 U.S.C. app. 3 §§ 1-12, and a Civil Investigative Demand issued to it under the FCA, 31 U.S.C. § 3733, all derived from the same basic allegations. *See* Wright & Miller, Federal Practice & Procedure 2d §

relators in the name of the United States as a real party in interest; it stands to reason that when the United States intervenes in such actions the general rule regarding relation back applies.

Quorum's reliance upon *Avco Corporation v. United States Department of Justice*, 884 F.2d 621 (D.C. Cir. 1989), is misplaced. The case stands for the simple proposition that, *prior to intervention*, the United States may use Civil Investigative Demands ("CIDs") under 31 U.S.C. § 3733. CIDs, an *ex parte* method of discovery appropriate for investigations, cannot be used once the government intervenes and discovery in the case proceeds under the Federal Rules of Civil Procedure. As demonstrated above, the United States' complaint after intervening relates back to the date of filing of relator's complaint, which was not at issue in *Avco.*

c. The Statute of Limitations Is Tolled While the Action Is Under Seal.

The statutory seal, 31 U.S.C. § 3730(b)(2), and the defendants' unawareness of the action during the investigative period, do not change the date of commencement of the action and the tolling of the statute of limitations for both the

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1501 ("As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense."); *Ross v. Patrusky, Mintz & Semel*, 1997 WL 214957, at *7-8 (S.D.N.Y. Apr. 29, 1997) (complaint-in-intervention relates back); *Staren v. American Nat'l Bank and Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976) ("The emphasis is to be placed on the determination of whether the amended complaint arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. The substitution of such parties after the applicable statute of limitations may have run is not significant when the change is merely formal and in no way alters the known facts and issues on which the action is based.").

relator and the United States. *See Costa,* 1998 WL 230979, at *3*; Rahman* at 14-15 (the fact that FCA claims are under seal does not change tolling rules). Rejecting the argument that the FCA statute of limitations should have continued to run while relator's complaint was under seal, the *Costa* court recognized that, by providing for sealed complaints yet failing to differentiate between sealed and unsealed complaints for purposes of the False Claims Act statute of limitations, Congress intended for the filing of a sealed complaint to toll the statute of limitations:

> Defendants submit that the court should devise a new rule which would permit tolling and relation back only when a complaint is unsealed. Defendants offer no support for this suggestion, save some policy arguments regarding the purpose of the statutes of limitations. Such policy arguments cannot prevail. Congress and the California legislature obviously knew when they provided for sealed complaints that defendants named in such complaints would not have notice of the instigation of an action. Still, neither Congress nor the Legislature differentiated between sealed and unsealed complaints. The court cannot substitute its judgment for that of these legislative bodies, no matter how reasonable or attractive are the arguments which defendants mount for their proposed rules.
>
> Title 31 U.S.C. § 3731, the statute of limitations for the federal False Claims Act, speaks in terms of when an action is "brought." It gives plaintiffs six years from the time a violation occurs to bring suit. If the fraud is concealed, plaintiffs may bring an action within three years after the facts material to the action become known to the official charged with acting on the violation, subject to a ten-year statute of repose. . .
>
> The present case was brought and filed on June 1, 1995.

On that date, the statutes of limitations were tolled.

Id. at 7. Beyond the fact that what Quorum argues is solely a policy argument, it is also inconsistent with precedent — the Supreme Court stated in *Henderson* that it is the filing of a complaint that matters for tolling purposes. 517 U.S. at 657 n.2; *see also Arabian v. Bowen*, 966 F.2d 1441.

Quorum's arguments that applying commonly understood principles of relation back to them would be unconstitutional fly in the face of well established constitutional principles. Under their logic, sealed indictments could never toll statutes of limitation for criminal offenses. It is well established, however, that sealed indictments toll statutes of limitation because among other reasons, "the protection of defendants by the statute of limitations must be balanced against the legitimate need of the government to safeguard its investigations." *United States v. Mitchell*, 769 F.2d 1544, 1547-48 (11th Cir. 1985) (citing *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (*en banc*). "The sealing of an indictment allows the government to complete an investigation properly, and can toll the statute of limitations when the investigation must extend beyond the statutory period." *Id.; see also United States v. Edwards*, 777 F.2d 644, 647 (11th Cir. 1985); *United States v. Bracy*, 67 F.3d 1421, 1426 (9th Cir. 1995); *United States v. DiSalvo*, 34 F.3d 1204, 1218 (3rd Cir. 1994) ("An indictment may be sealed for any legitimate law enforcement reason or where the public interest requires it. A properly sealed indictment then tolls the statute of limitations.") (citations omitted). And precedent

discussing the right of the public to access criminal *trials, e.g. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), while possibly extendable to a civil trial under the FCA, *cf. Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985), has simply no bearing on the FCA's preliminary statutory sealing period prior to the United States' decision whether to intervene.

d. Even Were the Court to Hold That it Had No Jurisdiction Over Relator's Initial Complaint the United States' Complaints Would Still Relate Back to January 5, 1993.

Quorum alleges that this Court lacks jurisdiction over Alderson's claims based on the "public disclosure" bar of 31 U.S.C. § 3730(e)(4). Even were Quorum's argument to be correct, it would affect neither this court's jurisdiction over the United States' claims nor the fact that the date for tolling the statute of limitations would remain January 5, 1993.[2] First, "[t]he United States may properly intervene in a suit by a putative source regardless of jurisdictional failures in the underlying suit." *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (citation omitted) (FCA action). And once the United States so intervenes, its intervention will relate back to the date of the initial complaint, when the action was brought on its behalf, so long as the factual basis of the suit is such that it can satisfy Rule 15(c), discussed above. "A complaint that is defective because it does not allege a claim within the subject matter jurisdiction of a federal court may be amended to state a different claim over which the federal court has

[2]This argument also relies on material inappropriate at the stage of a motion to dismiss.

jurisdiction. If the claim asserted in the amendment arises out of the conduct or occurrence set forth in the original complaint, the amendment is given retroactive effect to the date the original complaint was filed." *Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1070 (5th Cir. 1981),[3] citing *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1159-60 (5th Cir. 1981), Fed.R.Civ.P. 15(c), and 3 Moore's Federal Practice ¶ 15.09 (2d ed. 1980). *See also* Wright & Miller, Federal Practice & Procedure 2d § 1497 at 80 ("Amendments curing a defective statement of subject matter jurisdiction ... will relate back" under Rule 15(c)); *Carney v. Resolution Trust Co.*, 19 F.3d 950, 954 (5th Cir. 1994).

e. Quorum's Argument That the Court's Decision to Sever the Quorum Defendants from Their Initial Codefendants Somehow Alters the Appropriate Tolling Date for Statute of Limitations Purposes Is Based on a Misreading of Caselaw and Would Subvert the Orderly Administration of Justice.

The complaint filed by plaintiffs on February 24, 1999, also relates back to relator's January 5, 1993 complaint. Quorum's argument that the court's decision to sever *United States ex rel. Alderson v. Columbia/HCA et al.*, No. 97-2035-CIV-T-23E, for the convenience of the court and parties, somehow granted them protection from liability for much of its wrongdoing is patently incorrect.

In response to an unopposed motion by Quorum in *United States ex rel. Alderson v. Columbia/HCA et al.*, No. 97-2035-CIV-T-23E, this court on February 10, 1999, severed Quorum from that litigation, ordering the United States and

[3] This case is binding precedent in the 11th Circuit. *See Bonner v. Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Alderson to file a complaint addressing only these defendants by February 24, 1999. Plaintiffs complied. Defendants now argue that it is this date, rather than January 5, 1993, which matters for purposes of tolling the statute of limitation. This argument misunderstands the purposes of Rule 21 severance, the powers of courts under that rule, and the situations where new complaints filed after dismissals without prejudice relate back to the earlier complaint.

It is a commonplace that complaints dismissed without prejudice have no effect – it is as if they were never filed. *E.g.*, *Stein v. Reynolds Securities Co.*, 667 F.2d 33, 33-34 (11th Cir. 1982) (previous case dismissed for failure to prosecute). Like most generalities, this statement has a large amount of truth to it, while missing significant qualifications and limitations. Complaints dismissed for failure to prosecute, voluntarily under Rule 41(a), for lack of service under Rule 4(j), and under similar rules do not toll statutes of limitation. *E.g.*, *id.*; *Robinson v. Willow Glen Academy*, 895 F.2d 1168 (7th Cir. 1990) (Rule 41(a)); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26 (6th Cir. 1987) (Rule 4(j) and failure to prosecute). In other circumstances, however, complaints are regularly dismissed without prejudice, yet new complaints filed due to such dismissal relate back to the original complaint. *See, e.g., Gordon v. Green*, 602 F.2d 743, 746-47 (5th Cir. 1979) (new complaint filed after dismissal of earlier complaint under Rule 8 relates back);[4] *Peterson v. BMI Refractories*, 132 F.3d 1405, 1414 (11th Cir. 1998) (reinstated lawsuit after

[4]This case is binding precedent in the 11th Circuit. *See Bonner v. Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

dismissal without prejudice for failure to serve defendant relates back); *Siegel v. Converters Transp., Inc.*, 714 F.2d 213 (2d Cir. 1983) (derivative suit relates back to filing date of dismissed direct liability suit).

The rule that complaints relate back to the date of an earlier complaint dismissed without prejudice is especially, though not only, true in the context of severances under Rule 21, where the United States knows of no case where a statute of limitations defense has been allowed to be interposed after severance. *Cf. McClelland v. Azrilyan*, 31 F. Supp. 2d 707, 712 (W.D. Mo. 1998) (Claims against one defendant severed, but will relate back if refiled)*; Maucieri* v. *Consolidated Rail Corp.*, 1998 WL 961397, at *1 n.2 (E.D. Pa. Dec. 18, 1998); *Alvarez v. Arour Pharmaceutical*, 1997 WL 566373, at *3 (N.D. Ill. Sept. 8, 1997); *Fendley v. Armstrong World Industries, Inc.*, 1998 WL 68908, at *1 n.4 (D.N.J. June 29, 1998) (order provided that complaint after severance would relate back); *see also Gordon*, 602 F.2d at 746-47 (new complaint filed after complaint dismissed without prejudice for violating FRCP 8 relates back). As the court in *Alvarez* said, it "read Rule 21 to mean that no claim by any plaintiff can be dismissed for misjoinder," 1998 WL 566373, at *3, see also Fed. R. Civ. P. 21 ("Misjoinder of parties is not ground for dismissal of an action"), so new filings must relate back.

Furthermore, it is illogical to argue that the severance of Quorum from Columbia/HCA and the remaining defendants would cause plaintiffs' claims against Quorum to be stale. Columbia/HCA has no argument that severance caused

plaintiffs' claims to become stale, since the complaint against it was never "dismissed." Like addition and multiplication, severance must be commutative — otherwise by randomly choosing which of two parties to dismiss when severing a case the court would be granting the one a windfall, while the other received naught.

The court in *Kun v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 949 F. Supp. 13 (D.D.C. 1996) faced an argument parallel to Quorum's argument here: faced with a complaint that the court found problematic (despite stating a legal claim), it dismissed that complaint without prejudice. The plaintiff, as invited by the court, submitted an amended complaint. Defendants argued that plaintiff's claims were thereby stale, an argument the court made short shrift of. The court explained that its dismissal could not work the magic defendants wanted:

> [T]he plaintiff's amended complaint ... was not barred by the statute of limitations because that complaint sought recovery for the same alleged acts of employment discrimination set forth in the timely-filed [earlier] complaint, and, therefore, relate back to that complaint. See Fed.R.Civ.P. 15(c)(2) ("An amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arouse out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]").
>
> The defendant, however, argues that the plaintiff cannot avail himself of Rule 15(c)'s relation back provision because the Court dismissed [the earlier action], without prejudice . . . . The defendant cites authority for the proposition that when a Title VII complaint is timely filed and later dismissed without prejudice, the ninety-day

> statute of limitations is not tolled, and a subsequent complaint premised on the same events or occurrences will be dismissed if more than ninety days have passed since receipt of the right-to-sue letter. *E.g.*, *Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2nd Cir. 1993).
>
> This authority is distinguishable. Courts have refused to permit a subsequently filed complaint to relate back that was dismissed without prejudice only when the non-prejudicial dismissal was pursuant to a rule which expressly authorizes dismissal of an entire lawsuit, such as Federal Rules 4(m), 12(b), Rule 37, or 41(a).
>
> Here, the Court dismissed [the earlier action] without prejudice, not to dispose of the lawsuit, but so the plaintiff could (1) excise the extraneous and legally frivolous claims from the complaint and make the complaint more coherent, and (2) re-open his case after completing those tasks. . . .
>
> . . .
>
> The Court herein could just as well have ordered the plaintiff to amend his complaint without dismissing his lawsuit without prejudice. Instead, the Court also ordered a non-prejudicial dismissal for docket management purposes. Thus, to bar the plaintiff from invoking the relation back provision of Rule 15(c) would be a triumph of technicality over justice and inconsistent with the mandate of Rule 1 which requires that the Federal Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. The plaintiff's Title VII claims will not be dismissed as untimely.

Id. at 16-18.

Even were the complaint filed on February 24, 1999 not to relate back under Rule 15(c), the United States believes that the doctrine of equitable tolling requires the tolling of the statute of limitations applicable to this action. "'Equitable tolling' is

the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998). While equitable tolling applies narrowly, *see Raziano v. United States*, 999 F.2d 1539, 1541 (11th Cir. 1993) (equitable tolling does not apply to "a garden variety claim of excusable neglect") – and clearly does not apply to dismissals without prejudice for, *e.g.*, failure to prosecute, *Justice v. United States*, 6 F.3d 1474 (11th Cir. 1993), it should certainly apply in a case such as this, where the plaintiffs acquiesced to defendants' motion based on the text of Rule 21 — that severance cannot lead to the dismissal of any claims.[5/] The severance method selected by the Court should not result in an interruption of the tolling of the statute of limitations.

f. The Relevant Statute of Limitations for Plaintiffs' FCA Claims Is Ten Years.

The statute of limitations provision of the False Claims Act, 31 U.S.C. § 3731(b), provides:

> A civil action under section 3730 may not be brought –
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> >
> > (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances,

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[5/] Were the court to hold that the statute of limitations were not tolled in this case the United States would, by necessity, file a motion under Rule 60(b) in *United States ex rel. Alderson v. Columbia/HCA* for reconsideration of the order granting severance.

> but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

The United States believes that the relevant FCA statute of limitation for this case is that contained in 31 U.S.C. § 3731(b)(3), which allows recovery in litigation filed up to 10 years after the date a violation is committed, where the United States did not know or reasonably should have known about the fraud more than three years before. As alleged in plaintiffs' complaint, the United States did not know, and could not reasonably have known, before December 1992, of the facts material to the causes of action pled in the complaint. See Cplt. ¶ 320. Quorum's argument otherwise, see Memorandum in Support of Motion at 7 n.9, depends not only on mischaracterizing the relevant date when this litigation commenced but also on including material not appropriately before the court on a motion to dismiss. Should Quorum prove successfully, after the evidence is developed, that the United States knew or reasonably should have known of Quorum's fraud before January 5, 1990 (three years before suit was filed), the United States would not be eligible to use this statutory provision. At the present, however, no such evidence is before the court.

g. The United States' Common Law Claims Also Relate Back to January 5, 1993.

Rule 15(c) provides that amended pleadings relate back so long as "the claim or defense asserted in the amended pleading arose out of the conduct,

transaction, or occurrence set forth or attempted to be set forth in the original pleading." The United States' common law and equitable claims are alternative theories of liability for the frauds alleged in the FCA claims. As they rely on the same underlying facts and fraudulent claims, they relate back to the date of relator's filing. *See Sessions*, 648 F.2d 1066 (new claims relate back to original claims even if the court lacked jurisdiction over the original claims); Fed. R. Civ. P. 15(c).

The United States agrees that the statutes of limitation applicable to its common law claims differ from those relevant to the FCA. Specifically, 28 U.S.C. § 2415(a) imposes a six year limitation period for claims for money damages based upon express or implied contracts, and 28 U.S.C. § 2415(b) imposes a three year limitation period for claims sounding in tort. Although the United States' seventh cause of action, for common law fraud, sounds in tort (and thus is subject to the three year period of limitation in § 2415(b), its claims for unjust enrichment (fourth cause of action), payment by mistake (fifth cause of action), and recoupment (eighth cause of action), sound in contract and are governed by the six year statute of limitation in § 2415(a). *See United States v. Beck*, 758 F.2d 1553, 1557-58 (11th Cir. 1985) (recoupment sounds in contract); *United States v. Stella Perez*, 956 F. Supp. 1046 (D. P.R. 1997) (unjust enrichment and payment by mistake sound in contract).

These statutory periods were tolled until at least December, 1992, when the United States was notified of Alderson's allegations, so the United States may

recover damages for the entire period relevant to this litigation. 28 U.S.C. § 2416(c) provides that:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which — ... (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances.

28 U.S.C. § 2416(c). *See Beck*, 758 F.2d at 1558; *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984) (Congress "intended that the government should not be penalized for excusable ignorance," so § 2416(c) applies in particular to instances of fraud.). The United States has averred that it neither knew nor reasonably could have known of Quorum's fraud before December, 1992. Therefore, it is entitled to recover under its common law theories for damages since January 1, 1985, as pled.

Finally, the United States' claim for disgorgement, its sixth cause of action, sounds in equity. *See United States ex rel. Zissler v. Regents of the University of Minn.*, 992 F. Supp. 1097, 1109 (D. Minn. 1998), Therefore, no statute of limitations applies, and thus recovery from January 1, 1985 forward is available under this theory, as well. *Id.*

2. Quorum's "Government Knowledge" Argument Fails to Protect It from Liability under the FCA.

Quorum's argument that it should not be liable for its misconduct for the time period *after* December 1992 misconceives the nature of this action and of the FCA. The False Claims Act allows the United States to recover for payments made as a

result of fraud. That the United States was investigating such a fraud does not magically make it non-fraudulent, as Quorum would have the court believe. The FCA imposes liability on those who submit false claims; it does not impose any direct burden on the government to stop people from filing false claims. Furthermore, this argument derives from Quorum's mistaken theory that it was the act of creating "reserve" cost reports that is the gravamen of this action. It is not — as we discuss in more detail in our response to Quorum's main motion to dismiss. These reserve cost reports merely contain evidence of Quorum's fraud, fraud which the United States diligently investigated.

Beyond this misconception, government knowledge does not bar an FCA action. *Kreindler*, 985 F.2d at 1156 ("the basis for an FCA claim is the defendant's knowledge of the falsity of its claim . . . which is not automatically exonerated by any overlapping knowledge by government officials"), *citing United States v. Ehrlich*, 643 F.2d 634, 638-39 (9th Cir. 1981); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not itself a defense."). While it is of course true that "[t]he fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim, that is, that it did not act with 'deliberate ignorance' or 'reckless disregard for the truth,'" *United Technologies, supra*, 985 F.2d at 1157 (*quoting* brief *amicus curiae* of the United

States), that is not what plaintiffs have alleged here, nor what Quorum argues. That the *relator* provided the United States evidence of Quorum's fraud is a far cry from Quorum itself supplying such evidence; the former implies nothing about Quorum's state of mind. Furthermore, any conclusion as to Quorum's knowledge through the lens of the knowledge of the United States is a factually intensive inquiry, inappropriate at the motion to dismiss stage. *See Hagood*, 929 F.2d at 1421; *Costa*, 1998 WL 230979, at *9.

Conclusion

Based on the foregoing, the United States respectfully requests that the court deny defendants' Motion to Dismiss Plaintiffs' False Claims Act and Fraud Claims (Statute of Limitations and Government Knowledge) in all respects.

Respectfully submitted,

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